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May 15, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

Re: Telephone Number Portability, CC Docket No. 95-116

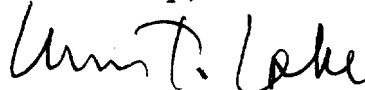
Dear Mr. Caton:

Robert B. McKenna of U S WEST, Inc. and the undersigned met today with Florence O. Setzer, Donald K. Stockdale, Jr., and Stephen N. Teplitz of the Common Carrier Bureau in connection with the pending petitions for reconsideration of the Commission's First Report and Order in the above proceeding.

As set forth more fully in the attached materials, U S WEST expressed the view that the Commission has a statutory and constitutional obligation to provide for the recovery of costs incurred by a local exchange carrier to provide federally mandated interim number portability.

Please contact me if you have any questions.

Sincerely,



William T. Lake

Enclosures

cc: Florence O. Setzer
Donald K. Stockdale, Jr.
Stephen N. Teplitz

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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MAY 15 1997

Federal Communications Commission
Office of Secretary

U S WEST COMMUNICATIONS, INC.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 96-731C

(Judge Andewelt)

FIRST AMENDED COMPLAINT

Plaintiff U S WEST Communications, Inc., for its complaint against the United States of America, states and alleges as follows:

Nature of the Action

1. This is an action pursuant to the Fifth Amendment of the United States Constitution to recover just compensation for a taking of plaintiff's property. Plaintiff U S WEST Communications, Inc. ("USWC"), a regulated telecommunications carrier, alleges that an order and final rule of the Federal Communications Commission ("FCC"), issued under the purported authority of the Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq. (the "Communications Act"), has taken USWC's property by requiring it to provide "currently available number portability measures" to competing telecommunications carriers without providing it with an opportunity to recover the costs of doing so. This action seeks just compensation for this taking.

2. Plaintiff USWC files this complaint at this time in order to protect its right to seek just compensation. USWC intends to assert on petition for review to the appropriate United States court of appeals that the order and rule that are the subject of this complaint are inconsistent with the Communications Act, arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law. For purposes of this action only, USWC does not contest that the FCC was authorized by the Communications Act to promulgate the order and rule that are alleged in this action to have constituted and effected a taking of USWC's property. See Loveladies Harbor, Inc. v. United States, 27 F.3d 1545, 1551 & 1555-56 (Fed. Cir. 1994).

The Parties

3. Plaintiff is USWC, a public service corporation incorporated under the laws of the state of Colorado, with its principal place of business in Denver, Colorado.

4. Defendant is the United States of America. The FCC is an agency of the United States established pursuant to the Communications Act.

Jurisdiction

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1491(a)(1).

Facts

Nature of USWC's Business

6. USWC provides local telephone and other local telecommunications services, access services for providers of intrastate and interstate long distance telecommunications service, and long distance telecommunications service within certain "Local Access and Transport Areas" ("LATAs") defined by the Communications Act. It is a "telecommunications carrier" as defined in 47 U.S.C. § 153(44), a "local exchange carrier" ("LEC") as defined in 47 U.S.C. § 153(26), and an "incumbent local exchange carrier" ("incumbent LEC") as defined in 47 U.S.C. § 251(h).

7. USWC has long provided, and now provides, "telephone exchange service" as defined in 47 U.S.C. § 153(47) in local telephone exchange areas throughout a region comprising fourteen states: Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

8. USWC currently provides local telephone service to the great majority of the population within the fourteen-state region in which it offers such service. USWC serves approximately 14 million customers within this region.

Government Regulation of Local Telephone Service

9. LECs have historically provided local telephone service on a monopoly basis. Both federal and state governments have pervasively regulated incumbent LECs, including USWC, with respect to their services, capital investments, revenues, expenses, rates and profits.

10. Historically, the FCC has regulated all interstate services provided by USWC, and state agencies have regulated USWC's intrastate services, that is, telephone services originating and terminating within the same state. Both the FCC and the states now also have roles in the regulation of USWC's provision of interconnection services mandated by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act").

The 1996 Telecommunications Act and Its Transformation of the Market for Local Telephone Services

11. On February 8, 1996, the 1996 Act became law, amending the Communications Act and radically altering the regulatory and competitive environment in which local telephone services are provided.

12. The 1996 Act opens all aspects of the market for local telephone services to competition. It mandates the rapid development of facilities-based and resale-based competition. The FCC has characterized the fundamental changes wrought by the 1996 Act as follows:

Historically, regulation of this industry has been premised on the belief that service could be provided at the lowest cost to the maximum number of consumers through a regulated monopoly network. State and federal regulators devoted their efforts over many decades to regulating the prices and practices of these monopolies and protecting them against competitive entry. The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition.

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,

CC Docket No. 96-98, First Report and Order, FCC 96-325 (released August 8, 1996)

("Local Competition Order") ¶ 1. Competitors and would-be competitors of each incumbent LEC include many large and well-established firms, including long distance carriers and other LECs.

13. The 1996 Act imposes certain affirmative obligations on incumbent LECs in order to assist other telecommunications carriers in competing against incumbent LECs. These affirmative obligations include requirements that incumbent LECs sell elements and features of their networks to their competitors at regulated prices and furnish some of such elements and features at no charge. Among other things, the 1996 Act requires incumbent LECs such as USWC:

- a. "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [LEC's] network --
 - (A) for the transmission and routing of telephone exchange service and exchange access;
 - (B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the [LEC] to itself or to any subsidiary [or] affiliate . . . ; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory,”

47 U.S.C. § 251(c)(2); see also 47 U.S.C. § 251(a)(1);

b. “to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the [FCC],”

47 U.S.C. § 251(b)(2);

c. “to provide dialing parity to competing providers of telephone exchange service and telephone toll service,” and “to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays,” 47 U.S.C. § 251(b)(3);

d. “to afford access to the poles, ducts, conduits, and rights-of-way of such [LEC] to competing providers of telecommunications services on rates, terms, and conditions that are [just and reasonable],” 47 U.S.C. § 251(b)(4);

e. “to establish reciprocal compensation agreements for the transport and termination of telecommunications,” 47 U.S.C. § 251(b)(5);

f. “to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory,” 47 U.S.C. § 251(c)(3); such unbundled network elements must be provided by each incumbent LEC “in a

manner that allows requesting carriers to combine such elements in order to provide such telecommunications service," id.;

g. "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers," 47 U.S.C. § 251(c)(4)(A);

h. "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications services," 47 U.S.C. § 251(c)(4)(B); see also 47 U.S.C. § 251(b)(1);

i. to provide, on just and reasonable rates and terms, for "physical collocation [or virtual collocation, if physical collocation is not practical] of equipment necessary for interconnection or access to unbundled network elements at the premises of the [LEC]," 47 U.S.C. § 251(c)(6); and

j. to "make available [on just and reasonable terms] to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services," 47 U.S.C. § 259(a).

14. The 1996 Act further requires that, by May 1997, the FCC must "complete a proceeding for the purpose of identifying and eliminating, by regulations[,] . . . market entry barriers for entrepreneurs and other small businesses in the provision and

ownership of telecommunications services. . . .” 47 U.S.C. § 257(a). In carrying out this requirement, the FCC “shall seek to promote . . . vigorous economic competition. . . .” 47 U.S.C. § 257(b).

15. The 1996 Act also provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,” 47 U.S.C. § 253(a), and requires the FCC to preempt the enforcement of any State or local statute, regulation or other legal requirement that violates or is inconsistent with this provision. 47 U.S.C. § 253(d).

16. Because of competition in the provision of local, access, and intraLATA long distance services, incumbent LECs such as USWC will be forced to seek recovery of the costs of providing each particular local telephone service (including any new service that USWC must provide pursuant to a government mandate) exclusively through the rates that it charges for that service. USWC will be unable to recover any of the costs of one service by charging amounts for other services in excess of the cost (including cost of capital) of those other services. If USWC were to attempt to recover the costs of one service by charging above-cost prices for another, it would simply lose market share to competing carriers providing such other services. This would be so even if federal or state regulatory agencies were to permit USWC to charge rates in excess of cost for such other services, because competition will not allow USWC to charge such higher rates. As the FCC has conceded, “It is widely recognized that, because a competitive market drives prices to cost, a

system of charges which includes non-cost based components is inherently unstable and unsustainable.” Local Competition Order ¶ 8.

17. Accordingly, for USWC to have a reasonable opportunity to recover the costs incurred in providing a newly mandated service, the governmental order mandating the service must provide a cost recovery mechanism that gives USWC a reasonable opportunity to recover all costs incurred in complying with the mandate.

Congress’s Number Portability Mandate

18. As alleged above, the 1996 Act imposed upon all LECs, including USWC, “[t]he duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the [FCC].” 47 U.S.C. § 251(b)(2).

19. The 1996 Act defines “number portability” as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.” 47 U.S.C. § 153(30).

20. The 1996 Act imposes on LECs this affirmative duty to provide number portability in order to make it easier and more attractive for customers of LECs to switch from one LEC to another. See S. Rep. No. 23, 104th Cong., 1st Sess. at 19-20 (1995); H. Rep. No. 204, 104th Cong., 1st Sess., pt. 1 at 72 (1995). The most immediate effect of number portability will be to make it easier and more attractive for customers of incumbent LECs such as USWC to switch their patronage from USWC to other LECs.

21. The 1996 Act further provides that “[t]he cost of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC].” 47 U.S.C. § 251(e)(2).

The FCC’s Number Portability Order

22. On or about July 2, 1996, the FCC released a First Report and Order on the subject of telephone number portability. Telephone Number Portability, First Report and Order (hereinafter “Number Portability Order”), CC Docket No. 95-116, FCC 96-286 (1996). The Number Portability Order was published in the Federal Register on July 25, 1996. 61 Fed. Reg. 38,605 (1996).

23. As part of the Number Portability Order, the FCC issued final rules governing number portability (“Final Rules”), codified as Part 52 of Title 47 of the Code of Federal Regulations. Number Portability Order ¶ 236. These rules became effective on August 26, 1996. 61 Fed. Reg. 38,605 (1996).

24. The Final Rules impose on all LECs, including USWC, obligations to provide a long-term, database method for number portability in certain areas by December 31, 1998. 47 C.F.R. § 52.3. They further impose immediate obligations upon all LECs, including USWC, to provide “transitional measures for number portability” (hereinafter “interim number portability”). See id. § 52.7 (hereinafter the “Interim Number Portability Rule”). Specifically, the Interim Number Portability Rule provides:

All LECs shall provide transitional measures, which may consist of Remote Call Forwarding (RCF), Flexible Direct Inward

Dialing (DID), or any other comparable and technically feasible method, as soon as reasonably possible upon receipt of a specific request from another telecommunications carrier, until such time as the LEC implements a long-term database method for number portability in that area.

25. Providing any type of interim number portability mandated by the Number Portability Order, namely "Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID), or any other comparable and technically feasible method," 47 C.F.R. § 52.7, imposes on a LEC such as USWC an affirmative duty to establish and continuously operate systems and mechanisms under which, for each customer of the LEC who switches to a competing carrier, the LEC forwards all calls placed to the telephone number of such customer from the network of the LEC to the network of the competing carrier together with information to enable the competing carrier to direct that call to the customer.

26. The competing carriers who are to receive interim number portability service pursuant to the Number Portability Order are in no sense the public to which USWC has historically been required to provide nondiscriminatory services on a common carrier basis.

The Interim Number Portability Rule's Imposition of Costs on USWC

27. The costs of implementing interim number portability include, but are not limited to, costs associated with call re-origination, tandem switching, call transportation, feature activation, billing, system administration, and other operational costs. The costs of implementing interim number portability include more than just the expense of routing

telephone calls to ported numbers. The largest share of the implementation costs that USWC has incurred to date, and a substantial fraction of the costs USWC will continue to incur in the future, are the labor and capital costs associated with hiring new employees and reassigning existing ones to handle the demands of the Interim Number Portability Rule.

28. The costs of providing interim number portability service to a competing carrier with respect to each ported telephone number are incurred entirely by the LEC that formerly served the customer to whom the telephone number is assigned. The competing carrier that newly provides local telephone service to such customer, and therefore depends on and benefits from the forwarding of calls placed to such customer's telephone number, incurs no interim number portability costs with respect to such customer. See Number Portability Order ¶ 122 (“[T]he costs of providing number portability in the immediate term are incurred solely by the carrier providing the forwarding service.”).

29. The great majority of customers who will transfer their telephone numbers from one carrier to another will be customers who switch their provider of local telephone service from the incumbent LECs such as USWC to competing carriers. See Number Portability Order ¶ 122 (“[I]nitially, the costs of providing currently available [i.e., interim] number portability will be incurred primarily by the incumbent LEC network because most customers will be forwarding numbers from the incumbents to the new entrants.”). Therefore, in the region in which USWC operates, USWC will incur the great majority of all costs of providing interim number portability.

30. The Interim Number Portability Rule requires USWC to incur all the interim number portability costs occurring as a result of USWC customers switching their provider of telephone service from USWC to a competitor of USWC.

31. USWC has already incurred substantial employment, capital, and related costs to meet its legal obligations under the Interim Number Portability Rule. It has hired and equipped new staff and reassigned existing personnel to plan for, take orders for, and implement interim number portability. The costs USWC has already incurred as a result of the Rule are significant.

32. Since the FCC's promulgation of the Interim Number Portability Rule, USWC has received specific requests for interim number portability from other telecommunications carriers in a number of USWC's service areas. As a result of these requests, USWC is now obligated to provide interim number portability "as soon as reasonably possible" in these areas. 47 C.F.R. § 52.7.

33. USWC expects that it will receive many additional specific requests for interim number portability from other telecommunications carriers in USWC's service areas and that its obligations to provide interim number portability will continue to expand.

34. USWC anticipates that it will incur total costs in excess of \$20 million to comply with the Interim Number Portability Rule.

The Number Portability Order's Failure to Provide a Cost Recovery Mechanism

35. The Number Portability Order fails to provide any federal mechanism for USWC to recover its costs of providing interim number portability.

36. The Number Portability Order also does not require state commissions to provide any mechanism for USWC to recover its costs of providing interim number portability.

37. The Number Portability Order requires that, in the event any state commission adopts any mechanism for recovery of costs incurred in providing interim number portability, the mechanism must satisfy guidelines that the FCC has adopted, purportedly pursuant to 47 U.S.C. § 251(e)(2). These guidelines, codified at 47 C.F.R. § 52.9, prohibit state commissions from adopting any cost recovery mechanism for interim number portability that would enable an incumbent LEC such as USWC to recover more than a small fraction of its costs of providing interim number portability from either the competing telecommunications carriers to whom USWC provides interim number portability service or the former USWC customers whose incoming telephone calls USWC must forward to such carriers. Number Portability Order ¶¶ 121-38. As a result, the Number Portability Order requires USWC to give its competitors a service that assists them in taking customers away from USWC without requiring those competitors (or their customers) to pay more than a small share of the costs of the service.

38. Because of competition in services provided by USWC, including competition mandated by the 1996 Act for local telephone services, and regardless of whether state commissions were to permit USWC to seek to do so, USWC cannot recover its costs of providing interim number portability by increasing the rates that it would otherwise charge its customers for other local telephone services.

39. USWC accordingly has no reasonable opportunity to recover its costs of providing interim number portability.

40. USWC has not recovered all of the costs it has already incurred to comply with the Interim Number Portability Rule.

Count I

41. USWC hereby realleges and reasserts all of the foregoing allegations as if fully set forth herein.

42. As a public utility, USWC is entitled, whenever it is required to provide a service to the public, to charge rates that give it a reasonable opportunity to recover its costs (including a reasonable rate of return on its invested capital) to provide such service.

43. The Number Portability Order fails to afford USWC a reasonable opportunity to recover the costs (including a reasonable rate of return on its invested capital) of providing interim number portability. The order is therefore confiscatory and constitutes a

taking of USWC's property within the meaning of the Fifth Amendment to the United States Constitution.

44. The United States has not provided USWC with just compensation for the aforementioned taking of USWC's property, as required by the Fifth Amendment to the United States Constitution.

45. As a result of the aforementioned taking of property without just compensation, USWC has been, and is continuing to be, damaged in an amount to be determined.

Count II

46. USWC hereby realleges and reasserts the allegations set forth in paragraphs 1 through 41 as if fully set forth herein.

47. The Number Portability Order imposes upon USWC an affirmative duty to provide a distinct service to its competitors. The competitors who are to receive the service are in no sense the public to which USWC has historically been required to provide nondiscriminatory services on a common-carrier basis. The order is therefore confiscatory and constitutes a taking of USWC's property within the meaning of the Fifth Amendment to the United States Constitution.

48. The United States has not provided USWC with just compensation for the aforementioned taking of USWC's property, as required by the Fifth Amendment to the United States Constitution.

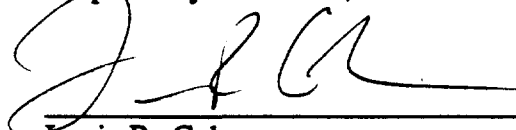
49. As a result of the aforementioned taking of property without just compensation, USWC has been, and is continuing to be, damaged in an amount to be determined.

Prayer for Relief

WHEREFORE, plaintiff prays that judgment be entered against the United States:

- (1) awarding plaintiff just compensation for the taking of its property in an amount to be determined;
- (2) granting plaintiff its costs, interest and attorneys fees, as allowed by law; and
- (3) granting plaintiff such other further relief as the law and evidence may justify and as the Court may deem just and proper.

Respectfully submitted,



Louis R. Cohen

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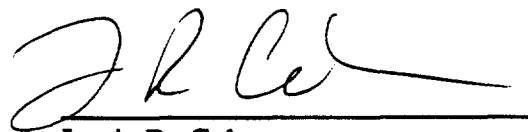
Attorney of Record

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 1997, I caused a true copy of the foregoing First Amended Complaint to be served by hand upon the following:

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Dated: February 18, 1997

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Federal Communications Commission
Office of Secretary

INTERIM NUMBER PORTABILITY COST RECOVERY

The Commission should reconsider and modify the approach taken in its First Report and Order on Number Portability to ensure that incumbent local exchange carriers ("LECs") are allowed to recover the costs of providing interim number portability. The Act requires LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). Relying on this provision, the Commission has determined that LECs must provide interim number portability. The Act further states that "[t]he cost of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." Id. § 251(e)(2). In implementing this provision in the First Report and Order, however, the Commission failed to provide a mechanism for LECs to recover their costs of providing interim number portability. Instead, the Commission simply promulgated some guidelines about what cost recovery mechanisms would not be competitively neutral. The Commission should modify its order to provide a federal cost recovery mechanism for interim number portability.

Discussion

The First Report and Order fails to establish a federal mechanism for LECs to recover their costs of providing interim number portability. Instead, the Commission left the issue of

whether LECs can recover the costs of interim number portability to the discretion of the states. Moreover, the Commission severely circumscribed the ability of states to provide for cost recovery by prohibiting them from adopting any cost recovery mechanism under which an incumbent LEC such as U S WEST could recover more than a small fraction of its costs of providing interim number portability from the competing carriers to whom the incumbent must give this service or from the former customers of the incumbent whose incoming calls the incumbent must forward. 47 C.F.R. § 52.9; Telephone Number Portability, First Report and Order, CC Docket No. 95-116, FCC 96-286, ¶¶ 121-38 (1996).

The Commission's failure to ensure that LECs recover their costs of providing interim number portability violates the terms of the Act. Section 251(e)(2) affirmatively requires the Commission to establish a cost recovery mechanism, which must be competitively neutral. The Commission has not done so.

That failure also breaches the responsibility imposed on the federal government by the Takings Clause of the Fifth Amendment. Because interim number portability is a service that the Act and the Commission's regulations require LECs to provide, the federal government has a responsibility to ensure that LECs will be able to recover their costs of complying with that mandate. First, U S WEST is entitled to just compensation for complying with the new obligation to provide a distinct service to its competitors, who do not constitute part of the public to which U S WEST historically has provided service on a common-

carrier basis. Failure to provide such compensation would be confiscatory and a taking of U S WEST's property within the meaning of the Fifth Amendment.

Moreover, because the Commission and the states are separate sovereigns, each bears the responsibility for ensuring the recovery of costs of services provided under its jurisdiction. The Commission may not simply assume -- as it has done here -- that state regulators will provide a means of cost recovery for a federally mandated service, just as states cannot impose mandates and place the cost recovery responsibility on the federal government. As the Supreme Court explained in Smith v. Illinois Bell Tel. Co., 282 U.S. 133, 148-49 (1930), state regulators have "no authority to impose intrastate rates, if as such they would be confiscatory, on the theory that the interstate revenue of the company was too small and could be increased to make good the loss." Id. at 148-49; see also id. at 149 ("[T]he validity of the order of the state commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business and of the compensation receivable for the intrastate service under the rates prescribed."); Public Svc. Comm'n of Maryland v. FCC, 909 F.2d 1510, 1516 (D.C. Cir. 1990) (Commission may preempt state's unilateral attempt to shift intrastate costs to federal jurisdiction).

This principle derives from the constitutional duty of a regulatory authority to allow a regulated utility to recover

its reasonable expenses and to realize a fair return on its capital dedicated to public service. See, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299, 307-08 (1989). The Fifth Amendment requires that the "total effect" of a "rate order" be to allow a utility to achieve such a recovery. See FPC v. Hope Natural Gas Co., 320 U.S. 591, 605 (1944). In an environment in which all-inclusive rate orders increasingly are being supplanted by service-specific mandates by federal or state regulators, the requirement that each such mandate carry with it the means for recovering the costs of compliance with the mandate is more important than ever -- it serves as a check against the temptation of one sovereign to rely on another to assure cost recovery and the ensuing risk that carriers will "be deprived of a fair rate of return when interstate and intrastate jurisdictions are both taken into account." Hawaiian Tel. Co., 827 F.2d at 1275; see also First Amended Complaint, U S WEST Communications, Inc. v. U.S., No. 96-731C (Fed. Cl. Feb. 18, 1997) (copy attached).

In the present context, this principle prevents the federal government from requiring U S WEST to provide interim number portability, while passing off responsibility for cost recovery to the states in the hope that they might somehow allow U S WEST to raise local rates or otherwise recover its costs. Such an attempt to shift cost recovery responsibility between jurisdictions creates the very real danger that "some costs of plant and expenses [will] not be included in the rate

computations of either the [state commission] or the FCC," an outcome that would result in an unconstitutional taking of U S WEST's property. Hawaiian Tel. Co. v. Public Util. Comm'n of Hawaii, 827 F.2d 1264, 1275 (9th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). In fact, the Commission has aggravated this problem by preventing states from establishing rules that permit U S WEST to recover the costs of implementing interim number portability from those entities on whose behalf the costs have been incurred.

The Commission itself has historically recognized that it must provide for the recovery of costs for federally mandated services. Thus, for example, when the Commission required carriers to implement databases for 800-number portability, it specified where in the existing regulatory scheme carriers could recover the new cost. See Provision of Access for 800 Service, Second Report and Order, 8 FCC Rcd. 907, 911 (1993). The Commission only recently reaffirmed its understanding that, in determining whether LECs' overall rates of return are constitutionally adequate, "we may not consider incumbent LECs' revenue derived from services not under our jurisdiction." Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 ¶ 737 n. 1756 (released Aug. 8, 1996) (citing Smith).

Thus, both the Act and the Fifth Amendment require the Commission to ensure that LECs such as U S WEST have a means of